IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

MONDAY, THE 1ST JANUARY 2007 / 11TH POUSHA 1928

CRL.A.No. 505 of 2005()

SC.38/2004 of the Additional Sessions Court
(Fast Track Court No.1), Manjeri dated 5.3.2005
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APPELLANTS: ACCUSED.
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1. VASU, S/O. VELU, POOLAKKAL HOUSE,
KEEZHATTUR, PERINTHALMANNA, MALAPPURAM DISTRICT.

2. MUHAMMED RAFEEQUE, S/O. MUHAMMED ALI,
KUNNATH HOUSE, PERINTHALMANNA, MALAPPURAM DISTRICT

3. K.MUHAMMED ALI, S/O. HASSAN,
ALLUR HOUSE, TIRURKAD, MALAPPURAM DISTRICT.

BY ADV. SRI.BABU S. NAIR

RESPONDENT: STATE.

THE STATE OF KERALA - REPRESENTED BY
THE CIRLCE INSPECTOR OF POLICE, PERINTHALMANNA-
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM, KOCHI - 31.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 01/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

CRL.APPEAL.NO.505 OF 2005 (C)

Dated this the 1st day of January, 2007

J U D G M E N T

KOSHY,J.

This appeal is filed by A1 to A3 in S.C.No.38/2004 on the file of the Additional Sessions Court (Fast Track Court No.I), Manjeri. They were convicted for the offence punishable under Sections 341, 323, 302 read with Section 34 of the Indian Penal Code and they were convicted and sentenced to undergo R.I. for life and to pay a fine of Rs.25,000/- each with a default sentence of three years. No separate sentence was imposed for the offence punishable under Sections 341 and 323 of the Indian Penal Code.

2. We have heard the arguments of both sides in detail. The prosecution case is mainly based on the dying declaration. On going through 313 statement, we are of the opinion that incriminating events and circumstances were not put to the

accused. We also note that in 313 statement, no signature of the accused was obtained in each page except in the last page. We also note that the common 313 statement was taken jointly from A1, A2 and A3. Except for the last question written in the last page wherein three different answers are given; with regard to other questions only one answer is given. Proceedings would not show which of the accused gave the answer or whether one accused was authorised by the other accused to answer the questions or whether such answers were given by all the three accused together. Different overtacts are alleged with each of the accused even in the dying declaration. But no such incriminating circumstances were put to such of the accused.

3. Learned Prosecutor argued that even if there is defect in taking 313 statement unless it is substantiated that prejudice is caused, no interference need be made by the appellate court.

Section 313(1) of the Cr.P.C. is as follows:

> Section 313 (1): In every inquiry or trial, for the purpose of enabling the accused personally to explain

> any circumstances appearing in the evidence against him, the Court-
> (a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;
> (b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case;
> Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under Clause (b).

Section 313 embodies fundamental principle of 'Audi Alteram Partem' rule. It is settled law that though questioning under Clause (1) (a) is discretionary (the word used is may), the questioning under Clause (1) (b) is mandatory (the word used is shall). It was held by the Apex Court in **State of Maharashtra v. Sukhdeo Singh (AIR 1992 S.C. 2100)** that the above provision is mandatory and cast a duty on the court to afford an opportunity to the accused to explain the incriminating materials against him. (See also **Basavaraj R. Patil v. State of Karnataka ((2000) 8 S.C.C. 740)**). It was held by the Hon'ble Supreme Court in **Rattan Singh v. State of H.P. (AIR 1997 S.C. 768)** that examination of the accused under Section 313 is not a mere formality, the questions put and the answers given have great use. The accused must be given opportunity to explain each and every circumstances

appearing in evidence against them in the prosecution evidence. The above opportunity is a valuable one. The above section enables the accused to 'personally' explain the circumstances. Since it is a personal right, it is imperative that each and every question must be put to the accused separately and their answers recorded also separately. The Supreme Court in **Bibhuti Vusan Das Gupta and another v. State of West Bengal (AIR 1969 S.C. 381), Usha K. Pillai v. Raj K. Srinivas (1993 Crl.LJ 2669 (SC))** held that at the close of the prosecution evidence the accused must be questioned and his pleader cannot be examined in his place. However in **Basavaraj R. Patil v. State of Karnataka ((2000) 8 S.C.C. 740)** it was held that where the accused files application supported by affidavit before the Court, that due to real difficulties he cannot appear before the Court, that no prejudice would result to him if he is allowed to be examined through his counsel, and also gives undertaking that he would not raise any grievance on that score at any stage of the case, the Court may, if it feels satisfied may exempt his personal appearance and examine his counsel under Section 313 of Cr.P.C. But Apex Court in **K. Anbazhagan v. Superintendent of Police (2003 AIR S.C.W 6468)** held that such a course can be

adopted only in very exceptional cases and dispensation of personal appearance is not a proper procedure.

4. It is true that mere defective/improper examination under Section 313 Cr.P.C., is no ground for setting aside the conviction of the accused, unless it has resulted in prejudice to the accused. Failure to comply with the provisions of this section is an irregularity; and unless injustice is shown to have resulted, a mere irregularity, is by itself not sufficient to justify an order of re-trial. The Appellate Court must always consider whether by reason of failure to comply with a procedural provision which does not affect the jurisdiction of the Court, the accused have been materially prejudiced. (See **State (Delhi Administration) v. Dharampal (AIR 2001 S.C. 2924)).** In **Parsuram Pandey and others v. State of Bihar (AIR 2004 S.C. 5068)** Apex Court observed as follows:

> "We have perused the statement under Section 313, Cr.P.C. and the question formulated by the trial Court in the present case and we may say that is is far from satisfactory. This Court time and again has laid down that it is obligatory on the part of the trial Court to examine the accused for the purpose of enabling the accused personally to explain any circumstance appearing in evidence against him. If such opportunity is not afforded, the incriminating piece of evidence available in the prosecution evidence

> against the accused cannot be relied upon for the purpose of recording the conviction of the accused person. It is imperative on the Court to record the statement under Section 313, Cr.P.C. of the accused persons so as to give opportunity to the accused persons to explain any incriminating circumstance proved by the prosecution. The duty cast on the Court cannot be taken lightly."

But at the same time Supreme Court refused to intervene in the concurrent findings on the ground that on the facts of the case no prejudice was caused and this ground was taken for the first time before the Apex Court. It is true that every piece of evidence need not be put to accused (See **Bakhshish Singh v. State of Punjab (AIR 1967 S.C. 752)).** Court has to ask only such questions which are brought on record as against accused as held in **State of H.P. v. Karanvir (2006 AIR S.C.W. 2853).** But those circumstances appearing in the evidence sought to be explained by the accused and appears to be incriminating against him must be put to him and the circumstances not put to the accused must be completely excluded because the accused did not have any chance to explain them, as held by the Apex Court in **Sharad Birdhichand Sarda v. State of Maharashtra (AIR 1984 S.C. 1622).** There is duty cast upon the Courts to question the accused properly and fairly so that it is brought home to

the accused in clear words the exact case that the accused will have to meet, and thereby an opportunity is given to the accused to explain incriminating circumstances against him brought out by evidence on record. The questions must be couched in simple language which can be understood by accused and separate questions shall be asked on each material circumstances as far as possible and distinct matters shall not be mixed up. As held by the Hon'ble Apex Court in **Kalapnath Rai v. State ((1997) 8 S.C.C. 732)** it is imperative that each and every incriminating circumstances revealed from evidence must be put to the accused separately and their answers recorded also separately. Even if allegations are common each accused shall be given such an opportunity separately.

5. In this case, we have already noticed that who answered the 313 questions is not mentioned in the order sheet. A common questioning is done and except in the last question, common answer is recorded. A separate 313 statement ought have been taken from each of the accused, even if the incriminating circumstances are same, separate questions, even if questions are identical should be put so as

to get answers from each of the accused. Here since different overtacts are alleged, atleast separate questions ought to have been put regarding the same. None of the major incriminating circumstances are put to the accused. Therefore no proper 313 statement at all was taken in this case and prejudice is likely to be caused to the accused. In the above circumstances, without expressing any opinion regarding the merits of the case, we set aside the sentence and conviction and remand the matter to the Sessions Court. The Sessions Judge is directed to proceed with the case from the stage of 313 statement and fresh judgment should be passed according to law.

In the result Criminal appeal is allowed by way of remand.

It is submitted by the counsel for the appellants that all the three accused were on bail during trial. Since we have set aside the conviction and sentence and the trial is to be conducted from the stage of taking 313 Statement, they should be released from prison with a direction that they should be present before the Sessions Court on 1.2.2007 and on that day fresh bail bonds should be executed. Since we come across several irregularities in taking 313 statement, in many cases,

Registry may communicate this judgment to the Judicial Academy for importing appropriate training to the Judicial Officers.

J.B.KOSHY, JUDGE

K.P.BALACHANDRAN, JUDGE

prp

J.B.KOSHY & K.P.BALACHANDRAN, JJ.

O.P.NO. OF 2006 ()

J U D G M E N T

17th November, 2006